

Record on Appeal
Res Judicata
BAP Rule 8006-1
BAP Rule 8009(b)
11 U.S.C. § 364(d)
11 U.S.C. § 361(3)
11 U.S.C. § 1307(c)
11 U.S.C. § 1329(a)
11 U.S.C. § 1326(a)(6)
Fed.R.Bankr.P. 9014
Fed.R.Bankr.P. 9023
Fed.R.Civ.P. 59

Smith v. Roost et. al

BAP

OR-00-1029-MaBK

OR-00-1192-MaBK

In Re Smith

Bankruptcy # 697-62183-aer13

11/30/00 BAP (affirming Radcliffe)
(underlying decisions in this consolidated appeal are
not in opinion index)

Unpublished

Debtor's confirmed plan provided for monthly payments, plus a sale or refinance of her main asset by a date certain in an amount sufficient to pay all claims or the case would be dismissed. Debtor defaulted on her monthly payments. As the sale or refinance date approached, she moved to "encumber property", to allow a refinance with a third party lender. The new loan would pay only the undisputed portions of the claims, leaving a substantial portion of the first lienholder's claim unpaid, plus all of the second lienholder's claim unpaid. The refinancing lender was to be provided a first lien on the property. The new loan would be at a higher interest rate than the existing loans.

At about the same time, one of the major secured creditors moved to dismiss or in the alternative, convert to Chapter 7.

After hearing, the court denied the motion to encumber and granted the motion to convert, the Debtor having advised the court that given the choice between dismissal and conversion she preferred conversion. Debtor then filed motions to reconsider those orders, and sought (by motion) to modify her plan to eliminate direct payments to the major secured creditor. The motions to reconsider were denied. Further, the court did not allow plan modification.

On Appeal: Affirmed.

The BAP first noted that Debtor had not provided an adequate record on appeal, thus providing an alternative ground to affirm.

It analyzed the motion to encumber under § 364(d). The bankruptcy court did not abuse its discretion in failing to allow a priming lien, where no protection, other than a purported equity cushion was offered. Debtor had not shown the ability to service the new loan, which, at a higher interest rate, would eat away more quickly at any equity cushion. Also, accruing attorney fees and interest on the secured creditor's claims, would eat away at the cushion. The BAP agreed that "priming" loans should only be allowed in "extraordinary situations."

The BAP rejected Debtor's argument that the conversion motion wasn't properly served because it wasn't served on all creditors and parties in interest. Service on the Debtor, and notice of the hearing confined to interested parties was sufficient under the rules. Further, dismissal was already contemplated by the plan's terms.

The BAP rejected Debtor's argument that pending claims litigation prejudiced her ability to comply with the plan. Further, the plan's terms could not be relitigated, as confirmation was res judicata. The BAP found no admissible evidence in the record supporting Debtor's contention that the secured creditors had thwarted sales attempts. It agreed there was adequate cause under § 1307(c) to convert given Debtor's prior plan defaults, and likewise, to deny confirmation of any modified plan as infeasible, especially because the proposed modified plan did not extend the original sale or refinance deadline, which had already passed.

Debtor's motions for reconsideration were treated as ones for new trials under Fed.R.Bankr.P. 9023 incorporating Fed.R. Civ.P. 59. The bankruptcy court properly denied them because Debtor made the same arguments in those motions as she made originally at hearing.

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re) BAP No. OR-00-1029-MaBK
GERALDINE KAY SMITH,) BAP No. OR-00-1192-MaBK
(consolidated)
Debtor.) Bk. No. 697-62183-aer-13
_____)
GERALDINE KAY SMITH,)
Appellant,)
v.) MEMORANDUM¹
ERIC R.T. ROOST, Chapter 7)
Trustee, WESTERN BANK;)
GOLD COUNTRY LENDERS,)
Appellees.)
_____)

Argued and Submitted on October 12, 2000
at Eugene, Oregon

Filed - November 30, 2000

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Albert E. Radcliffe, Chief Bankruptcy Judge, Presiding

Before: MARLAR, BRANDT, and KLEIN, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

FILED
NOV 30 2000
NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

E00-16(31)

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1 A. The Appellees' Secured Claims

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3 Western Bank filed its first proof of claim in 1997, to
4 which the debtor objected. Following litigation, a failed
5 settlement attempt, and further litigation on a second amended
6 proof of claim, Western Bank then filed its third amended proof
7 of claim, in 1998, in the amount of \$106,130.26. In July 1999
8 (post-confirmation), the bankruptcy court allowed Western Bank's
9 secured claim in the amount of \$102,669.89 plus interest,
10 pursuant to § 506(b)³.

11 The debtor appealed the order allowing the secured claim.
12 That appeal was consolidated with the her appeal of the
13 bankruptcy court's order denying her motion for reconsideration
14 of the order confirming her chapter 13 plan. The consolidated
15 appeal was pending during these proceedings in bankruptcy court.
16 The BAP subsequently affirmed the bankruptcy court's orders.
17 See In re Smith, No. OR-98-1499 and No. OR-99-1563
18 (consolidated) (9th Cir. BAP Oct. 11, 2000) (amended mem.).

19 GCL also filed proofs of claim. Its third amended claim
20

21 ³ The interest was awarded pursuant to § 506(b) based on
22 Western Bank's oversecured status. This section provides:

- 23 (b) To the extent that an allowed secured claim is secured
24 by property the value of which, after any recovery
25 under subsection (c) of this section, is greater than
26 the amount of such claim, there shall be allowed to
the holder of such claim, interest on such claim, and
any reasonable fees, costs, or charges provided for
under the agreement under which such claim arose.

1 was in the amount of \$61,182.59. The debtor objected to each
2 proof of claim. Following trial, in July 1999, the bankruptcy
3 court allowed GCL's secured claim in the amount of \$68,980.91.
4 This amount included \$43,000 in principal, based on a cross-
5 collateralized installment note, plus interest, attorneys' fees
6 and costs.

7 The debtor appealed that order. The panel affirmed the
8 order allowing GCL's claim, but remanded to the bankruptcy court
9 so that it could recalculate the amount of the claim. The panel
10 directed that the claim should not include any sums based on two
11 underlying notes, including a \$15,000 note that had been paid
12 off by investors, or a new \$15,000 note that had been executed
13 in favor of the investors, which were not referred to in the GCL
14 trust deed. See In re Smith, No. OR-99-1542 and No. OR-99-1543
15 (consolidated) (9th Cir. BAP Aug. 4, 2000) (mem.).⁴ In any
16 event, following any deduction to be made upon remand, GCL will
17 likely have an allowed secured claim for a substantial amount,
18 subject to further appeal, if any.

19 20 B. The Plan

21
22 The debtor's first chapter 13 plan relied on funding from
23 her income. However, the court denied confirmation of that
24

25 ⁴ We take judicial notice of our prior decisions. In re
26 Ditter, 205 B.R. 213, 214 n.3 (9th Cir. BAP 1996); Fed.R.Evid.
201.

1 plan, in part based on lack of feasibility. See Transcript of
2 November 9, 1999 hearing, p. 4.

3 On November 20, 1997, the debtor filed a Third Amended Plan
4 ("Plan"), which contemplated full payment of all allowed claims
5 from the proceeds of either a sale or a refinancing of her
6 property. The confirmation order was entered on May 19, 1998.
7 That confirmation order was not timely appealed and is final.⁵

8 Paragraph 2 of the Plan provided that the secured creditors
9 would be paid their undisputed claims according to their pre-
10 petition contract terms, unless otherwise provided in the Plan,
11 and that the following pre- and post-petition arrearages would
12 be cured and paid through the Plan:

13 Western Bank	\$10,771, plus \$9,693.90 post-
	petition arrearage
14 Curry County Tax	
15 Collector	\$12,114, plus \$2,900 post-
	petition arrearage
16 GCL	\$46,520

17 All creditors under the Plan would receive a minimum of
18 100%, plus a six percent discount factor, on their allowed
19 claims. The interest rate on Western Bank's secured claim was
20 modified to 9.375% by the confirmation order.

21 Paragraph 4 of the Plan further provided that Western Bank
22 would be paid its regular post-petition payments outside the
23

24 ⁵ The debtor filed an untimely motion for reconsideration
25 of the confirmation order. The panel determined that there were
26 no grounds to vacate the underlying confirmation order, and it
was affirmed. See In re Smith, No. OR-98-1499 and No. OR-99-
1563 (consolidated) (9th Cir. BAP Oct. 11, 2000) (amended mem.).

1 Plan, a sum of about \$1,050 per month. Paragraph 4, as modified
2 by the confirmation order, also provided that other secured
3 creditors, the Oregon Department of Veterans Affairs (ODVA), and
4 Frank and Marie Webre, whose claims were secured by other
5 collateral, would also have their regular post-petition loan
6 payments paid directly by the debtor. The post-petition real
7 property taxes were also to be paid pursuant to Paragraph 4.

8 The confirmation order further provided that "all allowed
9 claims" would be paid "in full as of the date of the sale" from
10 "a lump sum payment of all net proceeds from the sale or
11 refinancing of [the subject] real property."

12 Paragraph 2(e) of the Plan described the prospective sale
13 of the property and stated, in relevant part:

14 The selling season in the Gold Beach area is from April
15 1st to October 1st. There are currently two separate
16 parties who have inspected the property and want to buy
17 the property. One party is a client of Century 21
18 Realty The other is a party with whom the
19 seller is dealing . . . directly, who is having his
20 attorney draft an offer based on a sales price which
21 would pay all debt of the estate. Century 21 also has
22 another client to whom they want to show the property.
23 Coldwell Banker Realty in Gold Beach also has a client
24 to whom they are planning to show the property, when
25 this client comes to town. Debtor has in the area of
26 at least \$250,000 equity, after paying her debt.

21 The confirmation order added a deadline for the sale or
22 refinancing of the property, or for dismissal of the case:

23 If the Debtor has not closed a sale or refinancing of
24 the real property . . . in an amount sufficient to pay
25 the allowed amounts of all claims before November 1,
26 1999, this case shall be and hereby is, dismissed
effective as of that date.

26 The confirmation order further required the trustee's

1 consent or notice and hearing, in order for the debtor, out of
2 the ordinary course, to incur debt or to sell or encumber her
3 interest in the real property during the five-year plan. By
4 late 1999, the debtor had neither sold nor refinanced the
5 property, as required under the Plan.

6
7 C. Debtor's Motion to Encumber Real Property
8

9 In October 1999, the debtor filed a "Motion To Encumber
10 Property And Motion For Stay, Pending Appeal, Of Only Disputed
11 Claims and Declaration."⁶ The debtor sought to borrow \$140,000,
12 and proposed to give the new lender a first priority deed of
13 trust on the property to secure the loan, thereby "priming," or
14 taking precedence over, the other liens on the property. The
15 loan was to be amortized over 30 years at 12% interest per
16 annum, with a balloon payment in five years. The monthly
17 payment would be \$1,568.

18 The debtor stated that she would use the loan proceeds to
19 pay all allowed claims against the estate, including the
20 undisputed portion of Western Bank's secured claim
21 (approximately \$86,000). The debtor did not propose, however,
22 to pay GCL any of its claim from the loan funds, because she
23

24 ⁶ The debtor sought to stay the payments under the
25 bankruptcy court's orders confirming the chapter 13 plan and
26 allowing Western Bank's claim, pending her appeal of those
orders. The panel subsequently rendered its decision and
affirmed the bankruptcy court's orders.

1 maintained that that claim was still disputed and unresolved.
2 She conceded, however, that the Western Bank claim had grown to
3 over \$100,000, and the GCL claim had grown to about \$68,000.

4 The debtor stated that she had not been able to obtain an
5 unsecured loan, and that this refinancing was the best way in
6 which to pay off the existing creditors, while she continued to
7 market her property for sale. She calculated that there would
8 be an equity cushion of about \$250,000 which would secure the
9 disputed claims of the appellees.⁷

10 By the time of the debtor's motion, her Plan payments had
11 been delinquent on several occasions, and the debtor had not
12 been paying Western Bank its regular post-confirmation payments
13 outside the Plan. Both Western Bank and GCL objected to the
14 debtor's motion.

15
16 **D. Motion to Dismiss or Convert**

17
18 On October 19, 1999, GCL filed a "Motion To Dismiss Or
19 Convert" the debtor's chapter 13 case. GCL argued that the
20 November 1, 1999 deadline for selling or refinancing would have
21 passed by the time of the November 9, 1999 hearing on the
22 debtor's motion to encumber. GCL also argued that the debtor's

23
24

⁷ The debtor figured that the disputed claims would total
25 about \$103,000 plus attorneys' fees (\$35,000 for Western Bank
26 plus \$68,804 for GCL). She then subtracted \$243,000 (the
\$140,000 new first lien plus \$103,000) from the \$499,000 value,
leaving an equity cushion of \$256,000.

1 refinancing proposal did not provide any payment of GCL's
2 approximate \$68,000 claim. GCL maintained that the debtor had
3 missed several regular payments to Western Bank since
4 confirmation, totaling more than \$13,000 in arrearages, and
5 that such default jeopardized its lien position. In addition,
6 GCL maintained that the debtor was not paying her real property
7 taxes and owed over \$19,000 in back taxes.⁸

8 The debtor opposed the motion. She maintained that it had
9 not been properly noticed to all creditors and interested
10 parties. The debtor also continued to dispute the appellees'
11 claims. Although the debtor did not dispute that payments were
12 overdue to Western Bank, she argued, nonetheless, that she did
13 not have to pay Western Bank anything until that claim and its
14 related contract issues were resolved. She contended that the
15 appellees were adequately protected by an equity cushion in the
16 property. She maintained that no taxes were overdue, because
17 certain of her payments had not been credited; she also stated
18 that any tax delinquencies would be cured, in any event, through
19 the refinancing proposal.

20 The debtor further argued that she was capable of meeting
21 the Plan payments. She maintained that ODVA and the Webres had
22 agreed to be paid directly by the debtor, and she blamed Western

23 ⁸ The record does not contain all of the evidence and/or
24 exhibits concerning the outstanding debt. The transcript of the
25 pertinent hearing is only a partial transcript consisting of the
26 bankruptcy court's ruling. We note that the debtor has the
burden of providing an adequate record for the panel's review.
In re Burkhardt, 84 B.R. 658, 660 (9th Cir. BAP 1988).

1 Bank for the language in the Plan and confirmation order which
2 required those creditors also to be paid by November 1, 1999.
3 Finally, the debtor contended that her case should not be
4 converted or dismissed where the Plan provided for 100% payment
5 of allowed claims.

6
7 E. Combined Hearing and the Bankruptcy Court Ruling
8

9 The hearing on both the debtor's motion to encumber and
10 GCL's motion to dismiss or convert was held on November 9, 1999,
11 following notice to interested parties. The bankruptcy court
12 made oral findings.

13 On the debtor's motion to encumber the real property, the
14 bankruptcy court found that the debtor's refinancing plan was
15 infeasible because she had not been making all of the regular
16 payments to the secured creditors, including Western Bank, and
17 had periodically fallen behind on her scheduled Plan payments.

18 The court observed that the debtor was proposing to
19 postpone payment to the appellees indefinitely. She proposed to
20 pay only about \$86,000 of the Western Bank claim, which had
21 climbed to over \$100,000. The court found that the new \$140,000
22 loan thus exceeded the amount by which the Western Bank loan
23 would be reduced, and that it would require payment of a higher
24 interest rate.

25 Since the debtor had not been able to make all of her
26 regular payments to date, the bankruptcy court found that

1 incurring this new loan debt and new lien would be "a
2 substantial impairment that does not exist at this time to the
3 remaining \$40,000 or so of the Western Bank claim" as well as
4 create "a substantial diminution in the position of Gold Country
5 Lenders who comes behind the current Western Bank loan."

6 The bankruptcy court noted that, while there was equity in
7 the property, it was being eroded by the nonpayment of the
8 secured debt and the continuing accrual of interest. In
9 addition, the bankruptcy court found that the substantial
10 litigation in the case would entitle the oversecured appellees
11 to seek reimbursement from the debtor for their attorneys' fees.

12 The bankruptcy court further found that the debtor had not
13 sold the property, as provided for in the Plan, even though two
14 peak selling seasons had passed. The court noted that the
15 debtor's previous operating plan had been denied for lack of
16 feasibility, and the reason the present Plan had been confirmed
17 was because it provided for the sale or refinance, and because
18 of the amount of the debtor's then-equity.

19 Therefore, the bankruptcy court denied the debtor's motion
20 to encumber and converted the case to chapter 7.⁹ Its order
21 converting the case was entered on November 12, 1999, and its
22 order denying the debtor's motion was entered on November 22,

24 ⁹ The bankruptcy court noted that the debtor, at an
25 earlier hearing on Western Bank's motion to dismiss, had stated
26 her preference for conversion rather than dismissal, if it came
to that. The debtor also raised this point in her opposition to
GCL's motion to dismiss.

1 1999. The debtor filed timely post-judgment motions.

2
3 **F. The Post-Judgment Motions**
4

5 The debtor's motions sought to: (1) alter or amend the
6 conversion order and the order denying her motion to encumber;
7 (2) modify the plan; and (3) stay the conversion order.¹⁰

8 The debtor contested the bankruptcy court's findings that
9 she was in material default under the Plan and that the
10 refinancing plan was infeasible or did not adequately protect
11 the appellees.

12 The debtor stated that she was justified in not paying
13 Western Bank's contract payments because the Bank would somehow
14 improperly be paid twice. She explained that her Plan contained
15 inconsistent provisions in that it provided for payment of
16 Western Bank's allowed secured claim from the lump sum sale or
17 refinancing proceeds, while at the same time providing for
18 regular payments in accordance with the terms of the existing
19 agreements. Therefore, she contended that Paragraph 4 of the
20 Plan should be modified to delete Western Bank, such that its
21 secured claim would only be paid from the sale or refinancing
22 proceeds, and the bank would no longer be entitled to receive

23
24 ¹⁰ The debtor has not presented an issue or argument on
25 appeal concerning the bankruptcy court's denial of her motion
26 for a stay of the conversion order pending appeal. See In re
Wymer, 5 B.R. 802, 806 (9th Cir. BAP 1980). Thus, this issue is
deemed abandoned. In re Branam, 226 B.R. 45, 55 (9th Cir. BAP
1998), aff'd mem., 205 F.3d 1350 (9th Cir. 1999).

1 regular monthly payments pursuant to the underlying note.

2 The debtor maintained that Western Bank's form of
3 confirmation order caused this confusion. She also stated that
4 unexpected maintenance and repair costs caused her to fall
5 behind in her Plan payments. She asserted that she could cure
6 all post-petition defaults within a few months, as she had done
7 on other occasions. The debtor contended that she was not in
8 arrears in any tax payments. Nor, according to the debtor, were
9 there any payments owing to Smuggler's Cove HOA, the other
10 secured creditor on the property.

11 On December 1, 1999, the bankruptcy court denied the
12 debtor's motion for reconsideration of the conversion order and
13 all other relief set forth in that motion. On December 8, 1999,
14 the bankruptcy court denied the debtor's motion to alter or
15 amend the order denying her motion to encumber.

16 On December 13, 1999, the debtor timely appealed the order
17 of conversion, the order denying her motion to encumber, and the
18 two orders denying her motions for reconsideration. These
19 appeals were consolidated.¹¹

20 21 ISSUES

22
23 The debtor has listed 10 issues in appeal No. 00-1029 and

24
25 ¹¹ Subsequently, on May 26, 2000, the bankruptcy court
26 approved the trustee's motion to sell the subject real property.
However, as of the time of oral argument, a sale had not been
consummated.

1 11 issues in appeal No. 00-1192. Eight of the issues are the
2 same in both appeals. Some of the stated issues will not be
3 addressed because they are outside our jurisdiction, irrelevant
4 to this appeal, or moot, in light of the debtor's previous
5 appeal of the claim allowance and Plan confirmation orders, and
6 the panel's affirmance thereof. Distilled, the remaining issues
7 can be restated as follows:

- 8
9 1. Whether the bankruptcy court erred when it determined
10 that the debtor's refinancing proposal did not
11 adequately protect the appellees' secured claims.
12
- 13 2. Whether the bankruptcy court correctly found "cause"
14 to convert the debtor's chapter 13 case under
15 § 1307(c).
16
- 17 3. Whether the bankruptcy court abused its discretion by
18 denying the debtor's motion to modify the Plan.
19
- 20 4. Whether the bankruptcy court abused its discretion by
21 denying the debtor's motions for reconsideration.
22

23 STANDARD OF REVIEW

24

25 We review the bankruptcy court's findings of fact under the
26 clearly erroneous standard, and its conclusions of law are

1 reviewed de novo. In re Powers, 202 B.R. 618, 620 (9th Cir. BAP
2 1996). "A finding is 'clearly erroneous' when although there is
3 evidence to support it, the reviewing court on the entire
4 evidence is left with the definite and firm conviction that a
5 mistake has been committed." United States v. United States
6 Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746
7 (1948).

8 The bankruptcy court's decision whether to allow the debtor
9 to incur debt secured by a senior lien under § 364 is reviewed
10 for an abuse of discretion. See § 364(d)(1) (providing that the
11 bankruptcy court "may authorize" such credit or lien). The
12 determination of whether a secured creditor is "adequately
13 protected" is a finding of fact, which can only be reversed on
14 appeal if it is clearly erroneous. In re Mellor, 734 F.2d 1396,
15 1399 (9th Cir. 1984); Fed.R.Bankr.P. 8013.

16 The bankruptcy court's decision to dismiss or convert a
17 chapter 13 case is reviewed for an abuse of discretion. See In
18 re Leavitt, 171 F.3d 1219, 1221 (9th Cir. 1999); In re Green, 64
19 B.R. 530, 531 (9th Cir. BAP 1986) (word "may" under § 1307(c) is
20 a "permissive word"). We also review the bankruptcy court's
21 refusal to confirm a modified plan for an abuse of discretion.
22 In re Than, 215 B.R. 430, 433 (9th Cir. BAP 1997); Powers, 202
23 B.R. at 620. The bankruptcy court's ruling on a motion for
24 reconsideration is reviewed under the abuse of discretion
25 standard. In re Agric. Research & Tech. Group, Inc., 916 F.2d
26 528, 533 (9th Cir. 1990).

1 A bankruptcy court abuses its discretion only when we have
2 a definite conviction that it made a clear error of judgment in
3 its conclusion, upon weighing all relevant factors. Corder v.
4 Howard Johnson & Co., 53 F.3d 225, 229 (9th Cir. 1994).

5 6 DISCUSSION

7 8 A. Inadequate Record on Appeal

9
10 The debtor has assigned error to the bankruptcy court's
11 factual findings. A finding of fact is "clearly erroneous"
12 when, although there is evidence to support it, the panel on the
13 entire evidence "is left with the definite and firm conviction
14 that a mistake has been committed." United States Gypsum Co.,
15 333 U.S. at 395. Thus, in order to review a factual finding for
16 clear error, the debtor must provide a record on appeal
17 containing the entire transcript, and all other relevant
18 evidence considered by the bankruptcy court. In re McCarthy,
19 230 B.R. 414, 417 (9th Cir. BAP 1999); Burkhart, 84 B.R. at 660-
20 61; 9th Cir. BAP Rules 8006-1 and 8009(b).

21 The debtor has only provided that portion of the November
22 9, 1999 hearing which contains the court's ruling. We can
23 presume that the debtor did not regard the missing portions of
24 the transcript as helpful to her appeal. McCarthy, 230 B.R. at
25 417; In re Gionis, 170 B.R. 675, 680-81 (9th Cir. BAP 1994),
26 aff'd mem., 92 F.3d 1192 (9th Cir. 1996). Moreover, we can

1 affirm where the record is inadequate to show clear error. In
2 re Friedman, 126 B.R. 63, 68 (9th Cir. BAP 1991); see also In re
3 Massoud, 248 B.R. 160, 163 (9th Cir. BAP 2000). Here the record
4 is inadequate; that inadequacy is an alternate basis for our
5 affirmance of the bankruptcy court's orders.

6
7 **B. The Debtor's Motion to Encumber - § 364(d)**
8

9 The debtor sought to refinance her property, pursuant to
10 the terms of the confirmed Plan, by borrowing \$140,000 and
11 giving the new lender a senior priming lien on the property.
12 The terms provided for an interest rate of 12% per annum and a
13 balloon payment after five years. The monthly payment would
14 have been slightly more than the payment to Western Bank.

15 The debtor contends that the bankruptcy court failed to
16 determine the amount of any delinquency in Plan payments, and
17 that its conclusion that the proposed refinance would mean a
18 higher monthly payment was a mistake of fact. However, the
19 debtor has failed to provide the complete transcript of the
20 evidentiary hearing. Therefore, the panel is limited to a
21 review of the record provided, in light of the court's ruling
22 and conclusions.

23 Section 364(d) provides that the bankruptcy court, after
24 notice and hearing, may authorize the obtaining of credit or the
25 incurring of debt secured by a senior lien on property of the
26 estate that is already subject to a lien, if "there is adequate

1 protection of the interest of the holder of the lien on the
2 property of the estate on which such senior or equal lien is
3 proposed to be granted." § 364(d)(1)(B).¹² The debtor has the
4 burden of proof on the issue of adequate protection.

5 § 364(d)(2). She maintained that the equity cushion provided
6 adequate protection.

7 Section 361 provides that adequate protection under § 364
8 may be provided by "granting such other relief . . . as will
9 result in the realization by such entity of the indubitable
10 equivalent of such entity's interest in such property."

11 § 361(3). A classic method for finding adequate protection is
12 the existence of an equity cushion, which if large enough may be
13 the sole basis for adequate protection. Mellor, 734 F.2d at
14 1400. An equity cushion is defined as "the value in the
15 property, above the amount owed to the creditor with a secured
16 claim, that will shield that interest from loss due to any
17 decrease in the value of the property" during the pertinent time
18 period. Id.

19 The purpose of adequate protection under § 361 is to
20 "insure that the secured creditor receives in value essentially

21
22 ¹² GCL maintains that § 364(d)(1) does not apply to post-
23 confirmation debt, since the property was no longer "property of
24 the estate." See § 1327(b) (vesting property in the debtor upon
25 confirmation, unless the plan provides otherwise.) The record
26 does not contain any legal conclusions by the bankruptcy court
as to this argument. We need not reach this interesting issue,
but note that all parties are bound by the confirmed Plan, which
provided for refinancing by the deadline of November 1, 1999 --
clearly post-confirmation.

1 what he bargained for" Id. at 1401. The determination
2 of adequate protection is ultimately an equitable one, decided
3 on a case-by-case basis. See In re Am. Mariner Indus., Inc.,
4 734 F.2d 426, 431 (9th Cir. 1984) (citing H.R. Rep. No. 595 at
5 339, 1978 U.S.C.C.A.N. at 6295; 3 COLLIER ON BANKRUPTCY § 361.03[1]
6 (15th ed. 2000)). Thus, facts may exist which show that the
7 equity cushion by itself will not adequately protect the
8 creditor by giving him the benefit of his bargain. See In re
9 Colrud, 45 B.R. 169, 178 (Bankr. D.Alaska 1984) (holding, under
10 Mellor, that an equity cushion "will suffice as adequate
11 protection under § 362(d)(1) and § 361 provided there are no
12 other factors which weigh more heavily in the creditor's
13 favor"). When a priming lien pursuant to § 364(d)(1) is
14 involved, courts may also look to the speculative nature of the
15 financing, In re Mosello, 195 B.R. 277, 292 (Bankr. S.D.N.Y.
16 1996), or question whether the secured interest to be primed is
17 being "unjustifiably jeopardized." In re Aqua Assocs., 123 B.R.
18 192, 196 (Bankr. E.D.Pa. 1991).

19 In this case, the oversecured appellees were entitled to
20 protection of their interest in the property, which interest
21 included their allowed secured claims -- including § 506(b)
22 post-petition interest and attorneys' fees -- up to the value of
23 the property. See In re McCombs Props. VI, Ltd., 88 B.R. 261,
24 266 (Bankr. C.D.Cal. 1988) (§ 506(b) requires payment of
25 interest on a secured creditor's claim during the bankruptcy to
26 be taken from the cushion).

1 The bankruptcy court found that the appellees' secured
2 interests were not adequately protected because the debtor had
3 proven that she was unable to service the existing debt. Thus,
4 a new debt, with higher accruing interest, would likely erode
5 the existing equity cushion. In addition, the appellees'
6 secured debt continued to accrue post-petition interest,
7 attorneys' fees, and costs. This scenario was especially
8 troublesome because the Plan was intended, in large part, to
9 cure arrearages and to pay post-petition priority tax debt.

10 The debtor contended that she could cure any default in
11 Plan payments, as she had done on other occasions. She
12 contended that the new loan would also be used to cure the
13 existing defaults. However, her proposal was only to pay
14 \$86,000 of Western Bank's claim and none of GCL's claim. That
15 meant that the appellees, whose allowed claims were still to be
16 determined, would assume greater risks while a new lender would
17 prime their liens.

18 The court's ability, under § 364(d), to prime an existing
19 lien is "reserved for 'extraordinary' situations." 3 COLLIER,
20 supra, § 364.05. "When the effect of new borrowing with a
21 senior lien is merely to pass the risk of loss to the holder of
22 the existing lien, the request for authorization should be
23 denied." Id. The bankruptcy court recognized that the secured
24 lenders were assuming the risk of not being paid the full amount
25 of their allowed claims, while at the same time, their equity
26 cushions were being substantially depleted. A bankruptcy court

1 is rightly reluctant to force a secured party to take on new
2 risks. See In re Chevy Devco, 78 B.R. 585, 590 (Bankr. C.D.
3 Cal. 1987).

4 The bankruptcy court's finding that the appellees were not
5 adequately protected by the proposed financial arrangement was
6 not clearly erroneous. Therefore, the bankruptcy court's denial
7 of the debtor's motion to obtain a new priming lien was based
8 upon sound reasoning and must be affirmed.

9
10 C. Conversion - § 1307(c)
11

12 Code § 1307(c) provides for dismissal or conversion of
13 chapter 13 cases for "cause." The section provides a
14 nonexhaustive list of such causes, including: "(1) unreasonable
15 delay by the debtor that is prejudicial to creditors; . . .
16 [and] (6) material default by the debtor with respect to a term
17 of a confirmed plan" See 8 COLLIER supra, § 1307.04.
18 The bankruptcy court has discretion, based upon the "best
19 interests of creditors and the estate," to convert or dismiss a
20 chapter 13 case. § 1307(c). Courts ordinarily prefer to defer
21 finding cause to exercise this power until after the debtor has
22 had a reasonable opportunity to cure a default and when it
23 appears that the plan cannot be modified in a manner that would
24 make completion feasible. 8 COLLIER, supra, § 1307.04[7].

25 The debtor contends that the motion to dismiss was not
26 properly noticed. She further challenges the bankruptcy court's

1 determinations that she was in material default under the Plan
2 or that her default had caused prejudicial delay. She maintains
3 that the default concerning the November 1, 1999 deadline was
4 caused by the appellees' alleged interference, and that any
5 default could be remedied by either the proposed refinancing or
6 by Plan modification. We address her major arguments, based on
7 the record before us, with the exception of the refinancing
8 matter that was previously discussed.

9
10 **1. The Motion to Dismiss or Convert Was Properly Noticed**

11
12 The debtor contends that the appellees failed to serve the
13 motion to dismiss or convert pursuant to § 1307(c) upon all
14 creditors and interested parties, including other secured
15 parties, but she has not cited a particular rule or authority.

16 Motions to dismiss or convert pursuant to § 1307(c) are
17 contested matters under Fed.R.Bankr.P. 9014. See Fed.R.Bankr.P.
18 1017(f)(1). The service of a motion in a contested matter is
19 intended to give reasonable notice and opportunity for hearing
20 to the "party against whom relief is sought." Fed.R.Bankr.P.
21 9014. In this case, that party was the debtor, who clearly had
22 notice and who opposed the motion.

23 The only requirement for noticing all creditors and
24 interested parties in connection with dismissal or conversion of
25 a chapter 13 case is found in Fed.R.Bankr.P. 2002(f), which
26 provides that "the clerk, or some other person as the court may

1 direct, shall give the debtor, all creditors, and indenture
2 trustees notice by mail of: . . . (2) the dismissal or the
3 conversion of the case to another chapter." This rule relates
4 to service of the ultimate order or event, not the initiating
5 motion.

6 GCL served its motion to dismiss or convert by first class
7 mail upon the debtor, the trustee, Western Bank, and the U.S.
8 Trustee. The Clerk's Office then sent, on October 22, 1999, a
9 notice of the hearing. The bankruptcy court docket indicates
10 that there was a certificate of service of this notice, but the
11 parties' excerpts of record do not include a copy of that
12 certificate. GCL has alleged that the notice was sent to the
13 "interested parties," which could mean the same limited parties.
14 Finally, when the case was converted, the court presumably sent
15 notice of that event to all creditors and interested parties, as
16 required by Rule 2002(f); that notice is not disputed. See
17 Bankruptcy Court Docket, Case No. 697-62183, item no. 338, dated
18 December 5, 1999.

19 We cannot conclude on the record provided that there was
20 any deficiency in notice. Moreover, a general notice of the
21 filing of the motion to dismiss was unnecessary, because the
22 confirmed Plan provided for automatic dismissal if the property
23 were not sold or refinanced by November 1, 1999.

1 2. The Secured Creditors Did Not Interfere
2 with Plan Performance
3

4 The debtor alleged that: (1) the appellees blocked her
5 attempts to sell the property; (2) their claims were unfounded
6 and required extensive litigation; and (3) Western Bank's
7 involvement in negotiating the terms of the Plan and/or the
8 confirmation order resulted in a Plan which duplicated the
9 payments to Western Bank and other secured creditors who were
10 being paid outside the Plan.

11 The arguments concerning thwarted sales are not supported
12 by any admissible evidence of abuse by the appellees. The
13 record does not reveal that the debtor presented any evidence
14 about these allegations at the November 9, 1999 hearing. To the
15 contrary, the appellees approved the debtor's Plan, which
16 provided for the sale of the property and the payoff of their
17 debts by a date certain. Therefore, it would be improbable that
18 they would try to block any sale which would accomplish that
19 end. In any event, lacking the entire record, we are not
20 convinced that the bankruptcy court's failure to find
21 interference by the creditors was clearly erroneous.

22 Additionally, the claims allowance litigation has proceeded
23 in piecemeal fashion over several years. The debtor contends
24 that the prolonged claims allowance process has prejudiced her
25 ability to satisfy the Plan's requirements. This complaint is
26 unfounded because it is common practice to resolve claims post-

1 confirmation. See In re Grogan, 158 B.R. 197, 199-200 (Bankr.
2 E.D.Cal. 1993). Claims litigation does not excuse the debtor
3 from commencing Plan payments, as required by § 1326(a)(1).

4 The debtor next contends that Western Bank's influence over
5 the Plan and confirmation order language resulted in double
6 payment of Western Bank's allowed secured claim, and therefore
7 she did not need to make such improper payments. This argument
8 is barred by the doctrine of res judicata. The debtor had an
9 opportunity to litigate the terms of the Plan and the
10 confirmation order, but did not do so in a timely manner.
11 Therefore, that order is final and binding. In re Ivory, 70
12 F.3d 73, 75 (9th Cir. 1995). All creditors and the debtor are
13 bound by the terms of the confirmed Plan.

14 15 3. The Debtor's Direct Payment Default Was Relevant

16

17 The debtor contends that the bankruptcy court improperly
18 considered delinquent direct payments when it analyzed the
19 debtor's payment defaults.

20 A chapter 13 plan provides a flexible means for repaying
21 creditors, and may include direct-payment provisions. Matter of
22 Aberegg, 961 F.2d 1307, 1308-09 (7th Cir. 1992). Here the
23 debtor apparently had insufficient income to make the Plan
24 payments as well as the payments to Western Bank and the other
25 secured creditors outside the Plan. Otherwise, there would not
26 have been monetary defaults under the Plan, or she would have

1 had the funds available to cure those defaults.

2 The record reveals that the bankruptcy court properly
3 balanced the equities by looking at the fact that the debtor had
4 not made thousands of dollars in payments to Western Bank,
5 either on its arrearages under the Plan or by direct payment.
6 This situation was prejudicial to both Western Bank and GCL,
7 whose outstanding claims continued to accrue interest and
8 attorneys' fees.

9 The debtor asserts that she was justified in not making
10 many of those payments because her Plan stated that only
11 "allowed" claims would be paid. She further asserts that the
12 appellees' claims were not finally resolved, and that double
13 payments would have resulted under the allegedly inconsistent
14 Plan provisions. However, she can point to no agreement for
15 delayed payments.

16 Either the bankruptcy court or state court can resolve
17 disputes concerning the balances owed when the time comes for
18 payoff; the issue is not ripe for our consideration. It is
19 unlikely that any court would authorize double payment of a
20 secured claim.

21
22 **4. The Bankruptcy Court Did Not Abuse Its Discretion**
23 **by Denying Plan Modification**
24

25 The debtor's failure to make even the monthly payments
26 called for under the Plan was a significant factor in the

1 bankruptcy court's decisions. Therefore, the debtor moved to
2 modify the Plan by eliminating the provision calling for direct
3 payments to Western Bank. She asserted that the monthly
4 payments to Western Bank were inconsistent with the Plan,
5 because another of its provisions provided for payment in full
6 of the allowed secured claim upon the sale or refinance of the
7 property.

8 A party may request plan modification after the
9 confirmation date but before completion of the plan, subject to
10 the requirements for plan confirmation, specified in 1329(a),¹³
11 and the bankruptcy court's discretion. Powers, 202 B.R. at 622.
12 A modified plan is essentially a new plan. Than, 215 B.R. at
13 434. As such, it must also meet the feasibility requirements of
14 § 1325(a)(6), which provides that "the debtor will be able to

15 ¹³ Section 1329(a) provides:

16
17 (a) At any time after confirmation of the plan
18 but before the completion of payments under such plan,
19 the plan may be modified, upon request of the debtor,
the trustee, or the holder of an allowed unsecured
claim, to -

20 (1) increase or reduce the amount of
payments on claims of a particular class
21 provided for by the plan;

22 (2) extend or reduce the time for such
payments; or

23 (3) alter the amount of the
distribution to a creditor whose claim is
24 provided for by the plan, to the extent
25 necessary to take account of any payment of
such claim other than under the plan.

26 11 U.S.C. § 1329.

1 make all payments under the plan and to comply with the plan."

2 The debtor's proposed modification did not include an
3 extension of the deadline for the sale or refinancing of the
4 property, which date had already passed. There was no
5 prospective sale pending at the time of the hearing. The court
6 had denied the request for priming financing. Thus, feasibility
7 was the most significant issue, which the bankruptcy court
8 properly resolved against the debtor. This factual
9 determination was not clearly erroneous. In re Gavia, 24 B.R.
10 573, 574 (9th Cir. BAP 1982).

11 The policy behind chapter 13 is to give individuals with
12 regular income the option of adjusting their debts pursuant to a
13 plan, in place of the liquidation of their nonexempt assets, in
14 order to pay creditors more than they would realize upon
15 liquidation. The bankruptcy court has already denied
16 confirmation of the debtor's proposed operating plan and only
17 confirmed the amended Plan in order to allow the debtor to
18 salvage her equity through refinancing or sale, because a
19 chapter 13 debtor can volunteer to pay creditors from capital
20 assets. See In re Burgie, 239 B.R. 406, 410-11 (9th Cir. BAP
21 1999). In this case, however, the debtor did not perform her
22 part of the bargain. The bankruptcy court had sufficient and
23 ample reasons to deny Plan modification and to convert the case
24 to chapter 7.

25 Based on the foregoing analysis, we hold that the
26 bankruptcy court correctly determined that the debtor's failure

1 to sell or refinance the property by the Plan deadline, so that
2 all claims would be paid in full, was cause for conversion. The
3 bankruptcy court's findings clearly reflect that there was both
4 a material default, and a delay that was prejudicial to
5 creditors. We perceive no error.

6 Additionally, the bankruptcy court found that conversion of
7 the case to chapter 7 would effectuate the sale of the property
8 and payment of all the claims, and was in the best interests of
9 the estate and the creditors within the meaning of § 1307(c).
10 This finding was not clearly erroneous in light of the Plan
11 provisions, the status of the case, and the debtor's agreement
12 at the hearing that she would prefer conversion to dismissal.
13 The bankruptcy court did not abuse its discretion by converting
14 the case to chapter 7.

15 16 D. Motions for Reconsideration

17
18 The debtors' timely motions for reconsideration are
19 considered to be motions for new trial under Fed.R.Bankr.P.
20 9023/Fed.R.Civ.P. 59. The bankruptcy court's orders can be
21 vacated if they resulted from manifest error of fact or law, or
22 if there was newly discovered evidence that would affect the
23 judgments. In re Nunez, 196 B.R. 150, 157 (9th Cir. BAP 1996).

24 A thorough review of the pleadings results in the
25 conclusion that the debtor's motions consisted of the same
26 arguments previously presented to the bankruptcy court. "A

1 motion for reconsideration should not be used to ask the court
2 'to rethink what the court had already thought through--rightly
3 or wrongly.'" In re Am. W. Airlines, Inc., 240 B.R. 34, 38
4 (Bankr. D.Ariz. 1999) (quoting Above the Belt, Inc. v. Mel
5 Bohannon Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983)).

6 Again, because the evidence and argument portion of the
7 transcript of the November 9, 1999 hearing has not been included
8 in the record, we have no basis on which to find the court's
9 oral findings clearly erroneous.

10 11 CONCLUSION

12
13 After more than two years, the chapter 13 debtor, in spite
14 of a firm and imminent deadline set forth in her confirmed Plan,
15 had not obtained a refinancing or sale of the real property
16 which would result in promised full payment of the secured debt.
17 The debtor's attempts to obtain a new loan, with a priming lien,
18 did not adequately protect the appellees' secured interests,
19 based on the facts of this case. The Plan clearly provided for
20 dismissal if the debtor failed to pay the allowed secured claims
21 by November 1, 1999. The debtor agreed that the court could
22 convert, rather than dismiss, her case. The bankruptcy court's
23 findings that the debtor had not shown that continuation of the
24 chapter 13 case was feasible, because she had defaulted on Plan
25 payments as well as on payments outside the Plan and had no firm
26 prospects for sale, were not clearly erroneous, and the court

1 properly denied her refinancing request.

2 The orders of the bankruptcy court, which denied her motion
3 to encumber the real property, converted her case to chapter 7,
4 and denied her post-judgment motions, are therefore AFFIRMED.